No. 84-701

In The

Supreme Court of the United States

October Term, 1984

UNITED STATES OF AMERICA,

Petitioner,

vs.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICUS CURIAE MID-ATLANTIC DEVELOPERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether federal jurisdiction to regulate discharges into "navigable waters" under the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251 et seq., extends to lands that merely have saturated soils and that exhibit a prevalence of vegetation typically adapted for life in such soils.

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INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.2, the Mid-Atlantic Developers Association files this brief as *amicus curiae* in support of the respondent, Riverside Bayview Homes, Inc. Letters of consent from counsel for the parties have been filed with the clerk.

The Mid-Atlantic Developers Association is a consortium of commercial developers in New Jersey and Pennsylvania. Its members have engaged in construction throughout the area, an

area dominated by large sections of wetlands. Because of this, the Association members must frequently apply for permits issued by the U.S. Army Corps of Engineers for the disposal of dredge or fill material into wetlands. They have therefore experienced firsthand the type of problems encountered by Riverside Bayview Homes in the instant case. The Association's members have endeavored to pursue a responsible course of development which will simultaneously lead to the economic prosperity of the region and the protection of valuable natural resources.

SUMMARY OF ARGUMENT

The jurisdiction of the Army Corps of Engineers over inland wetlands with no direct connection to any navigable water is in doubt due to the Sixth Circuit's decision. This decision however, contrary to the position taken by petitioner, does not sound a death knell for protection of these wetlands. The individual states, through the exercise of their police power, are not only capable of administering wetlands programs, they are better equipped to do so than the federal government.

Regulation of the use of land within a state's own borders has traditionally been held to be a matter of primarily local concern. Yet the Corps of Engineers has ignored legitimate state interests in its 404 program. The social costs of engrafting a national solution onto a local problem have been staggering. Local communities have suffered whether development is allowed or rejected when the decision is made contrary to the community's wishes. For the developer, the innumerable delays besetting the 404 program have resulted in lost revenues and opportunities.

Notwithstanding the claims of the petitioners, a number of states have enacted programs which do an admirable job of protecting inland wetlands. An examination of a few representative state programs shows their obvious superiority to the federal plan.

States have avoided the problems experienced by the Corps by providing for landowner notification of a possible wetlands problem, by refining the definition of wetlands and by establishing a clear procedure to deal with the taking issue.

The Corps has even had difficulty in interpreting its own regulations. Decisions on jurisdiction around the country show a marked inconsistency both locally and nationwide. The Corps has been criticized publicly for being too lax in enforcement and at the same time for exceeding the scope of congressional delegation. Both criticisms are valid as there is no definable standard that the Corps has consistently followed. Because of this, the Sixth Circuit properly declined to give deference to the Corps' assertion of jurisidiction over Riverside's property.

The conclusion to be drawn from these legal and factual arguments is that no harm to the nation's wetlands will result from the Sixth Circuit's decision. The individual states will protect the wetlands within their own borders from destruction and will, in fact, do so more efficiently and more wisely than the federal government.

ARGUMENT

I.

THE REGULATION OF FRESHWATER WETLANDS IS AN APPROPRIATE FUNCTION OF THE INDIVIDUAL STATES.

The briefs submitted on behalf of the petitioner draw a picture of intense federal interest in preserving and protecting wetlands. This scenario is incomplete, however, without an examination of the significant state interests in this same matter. This case involves the Corps' jurisdiction over interior wetlands, wetlands with no

direct connection to any body of navigable water. The greater part of wetlands of this sort lie wholly within intrastate boundaries in an area where the states' interests are paramount. Despite this, the federal government through the Army Corps of Engineers has seen fit to ignore the traditional state interest in lands within that state's own borders.

This is in contravention to the express mandate of Congress as reflected in the Clean Water Act of 1972, as amended in 1977, 33 U.S.C. § 1251(b) (CWA). This section entitled "Congressional declaration of goals and policy" provides in relevant part:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the administrator in the exercise of his authority under this chapter.

In interpreting this section of the CWA, both state and federal courts have held that Congress intended to give the primary responsibility for control of water pollution to the states. *District of Columbia v. Schramm,* 631 F. 2d 854 (D.C. Cir. 1980); *Mississippi Commission on Natural Resources v. Costle,* 625 F. 2d 1269 (5th Cir. 1980) and *People v. Ludlow,* 75 Misc. 2d 556, 348 N.Y.S. 2d 20 (App. Term 2nd Dept. 1972).

When Congress invites significant state involvement in a given area, federal regulations in that same field should, to the maximum extent possible, be consistent with state objectives. *Cape May Greene, Inc. v. Warren,* 698 F. 2d 179 (3rd Cir. 1983). In that case, involving the Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.*, the Third Circuit held that when a federal

statutory scheme encourages, though does not direct state involvement, the intent of Congress is deemed to be consistency with the state's determination, whatever that might be. 698 F. 2d at 191.

In the context of the present case, Congress did indeed encourage state participation in wetlands management through the CWA. This theme runs consistently throughout the Act. For example, 33 U.S.C. § 1253 directs the Administrator to encourage uniform state laws. Even 33 U.S.C. § 1344(g)-(k), part of the very section under review, allows the states to assume the Corp's permit program when navigable waters are not involved. Finally, 33 U.S.C. § 1344(t) recogizes the ultimate authority of the state to control the discharge of fill into navigable waters within its own jurisdiction and directs federal agencies to comply with state requirements.

These sections and others, taken together, evince a congressional recognition that the states not only have a legitimate interest in regulating wetlands within their borders, they are well equipped to do so. In fact, the individual states are better equipped to deal with these matters than the federal government.

At the outset, it is important to recognize that land use is primarily a local concern. This Court has said so in quite explicit terms. *See Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) and *Kidd v. Pearson,* 128 U.S. 1 (1888). This long standing maxim is of special validity in the context of the present case, the issue before the Court being the regulation of interior wetlands having no direct connection to navigable waters. State and local agencies are quite obviously more closely attuned to the needs and concerns of the individual communities most closely affected by regulation of these local wetlands.

It is the local communities which must bear the brunt of a Corps wetlands decision. The local communities are the ones who will bear the cost of combatting the diseases associated with the often stagnant marshes and bogs which frequently constitute inland wetlands not inundated by navigable waters. Such wetlands are breeding grounds for mosquitoes which spread a plethora of diseases creating a burden on local health care. In addition, communities suffer a loss of ratables when the Corps refuses to allow local development, ratables a community might need to support its infrastructure.

Conversely, communities may be adversely affected when the Corps decides to grant a permit without giving full consideration to local concerns. Such a decision puts pressure on communities to give the local approvals required in the face of a federal sanction of development. An unwanted development could put a severe strain on a community's schools, its sewer system and its roads. These are all factors best dealt with on a smaller scale, not by a federal agency attempting to apply a national standard on a local level. This is especially true in the context of an agency criticized by Congress for its unwillingness to resolve local concerns. Office of Technology Assessment, *Wetlands: Their Use and Regulation,* 151 (1984) (hereinafter OTA Report).

There are also procedural advantages to state and local administration of wetlands resources. As an agency of the federal government, the Corps is subject to certain constitutional restraints. Regulation of interior wetlands is ostensibly authorized by 33 CFR 323.2(3). As a prerequisite to Corps' jurisdiction, this regulation mandates a showing that the use, degradation or destruction of the wetlands would affect interstate commerce. A commerce clause nexus must be proved to support Corps' jurisdiction.

The states, on the other hand, derive their authority over wetlands from the police power. The police power has been called

the least limitable of the powers of government. *Queenside Hills Realty Co. v. Saxl,* 328 U.S. 80 (1945); *McDonald v. Mabee,* 243 U.S. 90 (1916). It is said to be the source from which springs the security of the social order. *Pearsall v. Great N.R. Co.,* 161, U.S. 646 (1895). The maxim underlying the police power is "*salus populi suprema lex est*" (the welfare of the people is the highest law). *St. Louis & S.F.R. Co. v. Matthews,* 165 U.S. 1 (1896). It thus follows that wetlands which serve an important ecological function will per se support police power jurisdiction. This obviates the need for proof of an interstate nexus and simplifies adminstration of the wetlands program.

The police power has indeed been held to support state wetlands programs. *Candlestick Properties, Inc. v. San Franscisco Bay Conservation & Development Comm.,* 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (Cal. Ct. App. 1970); *Potomac Sand and Gravel Co. v. Governor of Maryland,* 266 Md. 358, 293 A. 2d 241, *cert denied,* 409 U.S. 1040 (1972) and *Commissioner of Natural Resources v. S. Volpe & Co.,* 349 Mass. 104, 206 N.E. 2d 666 (Mass. 1965). These determinations are made easier by the presumption of validity which attaches to any exercise of the police power. *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962).

Operating a wetlands program on a national scale also results in procedural inefficiencies extracting a significant toll on the public at large. The cost of paperwork alone was estimated in 1980 to be 17.3 million dollars. *OTA Report* at 154. The most visible cost, however, is the delay. A study by the Office of Management and Budget concluded that the Corps permit program has been "plagued by severe delays that have generated complaints and imposed heavy economic burdens on the public." *OTA Report* at 156. The scope of this problem is evidenced by the 815 days it takes to process a permit application when an Environmental Impact Statement (EIS) is required. *OTA Report* at 157. While the number of projects requiring an EIS is admittedly small, the

ruinous effect on these businesses of such a protracted delay cannot be ignored. The total monetary cost of permit processing delays has been estimated by OMB at 1.5 billion dollars. *OTA Report* at 159. These figures must be evaluated in light of 33 U.S. C. § 1251(f) which establishes a national policy for the minimization of paperwork and the elimination of delays.

In short, the scope of the police power and the improved efficiency of administration, support the idea that the individual states, not the federal government, are best equipped to deal with the regulation of interior wetlands. Congress recognized this and for this reason intended the Corps to exercise its jurisdictional authority in conformity with state interests.

II.

STATE WETLANDS PROGRAMS CURRENTLY IN EXISTENCE AFFORD FULL AND ADEQUATE PROTECTION FOR INTERIOR WETLANDS.

The point is raised in the various briefs submitted on behalf of the petitioner that the Army Corps of Engineers 404 program offers the only effective protection for interior wetlands. While these briefs admit that some states have programs for the protection of coastal wetlands, they argue that interior wetlands survive only through the intercession of the federal government. This argument, however, is based on a serious misconception of the states' role in wetlands preservation. A number of states have specific programs which protect the very type of wetlands which form the basis of the instant case. An examination of but a few representative state programs shows clearly the error of the petitioner's argument.

One state which has enacted a comprehensive wetlands act is Michigan, the site of the Riverside Bayview Homes Property.

This enactment, effective October 1, 1980 is entitled the Goemaere-Anderson Wetland Protection Act and is codified at MCLA 281.701 *et seq.* Like the Corps of Engineers' 404 program, this act prohibits the placing of fill material in a wetland without first obtaining a permit. MCLA 281.705. Unlike the Corps' program, however, the Michigan Act is specifically made applicable to inland wetlands. MCLA 281.702(g)(ii) and (iii). The Michigan Legislature has also seen fit to make specific legislative findings of the value of wetlands. MCLA 281.703. These findings are remarkably similar to the positions taken by the environmental groups submitting briefs in this case. They recognize the value of wetlands for flood and storm control, wildlife habitat, protection of subsurface water resources, pollution treatment, erosion control, etc. The attitude of the Michigan Legislature is clear. Even in the absence of Corps' regulation, Michigan wetlands would be protected. In fact, under the Michigan Act the department is specifically instructed to consider national concerns. MCLA 281.709(2).

In addition to being more explicit than the federal act, the Michigan statutory scheme is more comprehensive. It addresses several points ignored by the federal act, points which have given rise to uncertainty and litigation with the Corps. Under MCLA 281.720 property owners who are affected by designation of their property as wetlands on a state prepared wetlands map, are so notified in their next property tax bill. This is a vast improvement over the federal system where a property owner's first notice of a wetlands problem may be a cease and desist order from the Corps. *See, e.g., Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F. 2d 897 (5th Cir. 1983). In addition MCLA 281.721 provides for the possibility that wetlands regulation may amount to a taking. The federal act has no such provision. This omission has led to a great deal of uncertainty as reflected in the Sixth Circuit's decision in the present case. In fact, there is so much confusion over the taking issue that federal courts are not even sure of the

proper forum in which to bring such a claim. *See 1902 Atlantic Limited v. Hudson,* 574 F. Supp. 1381 (E.D. Va. 1983). Thus, in many ways the Michigan Wetlands Protection Act is superior to the federal scheme.

New York is another state with a stringent wetlands protection act. N.Y. Envtl. Conserv. L. 24-0101 *et seq.* (McKinney 1984) is entitled the "Freshwater Wetlands Act". Freshwater wetlands are defined in Section 24-0107 according to the type of vegetation present. There is no inundation or saturation requirement so the state definition encompasses significantly more land than the federal. Like the Michigan Act, New York requires that notice be given to any affected landowner. Section 24-0301(5). The Freshwater Wetlands Act prohibits the placing of fill in wetlands without a permit and provides for the taking possibility when a permit is denied. Section 24-0705(7). Finally, Section 24-0905 provides for an abatement in the tax assessment of any land subject to use restrictions because of a wetlands determination. Clearly, the New York Freshwater Wetlands Act is a comprehensive and well thought-out program designed to avoid many of the problems inherent in the federal system.

A state with a statutory plan quite familiar to this *amicus* is New Jersey. As a coastal state, New Jersey has a specific enactment for the preservation of coastal wetlands. N.J.S.A. 13:9A-1 *et seq.* This does not mean, however, that inland wetlands are any less protected. New Jersey has two separate statutory schemes for the protection of inland wetlands with a third presently under consideration. The first of these is entitled the Pinelands Protection Act, N.J.S.A. 13:18A-1 *et seq.*

The New Jersey Pinelands is a vast natural area comprised of 1,082,816 acres in the central and southern parts of the state. Pinelands Commission, *Comprehensive Management Plan for the Pinelands National Reserve* 127 (1980) (hereinafter *Pinelands*

Plan). Twenty percent of this area, or more than 200,000 acres, has been officially classified as inland wetlands. *Id.* Like the Michigan and New York statutes, the Pinelands Protection Act is specifically applicable to inland wetlands.

Pursuant to statutory authority, the Pinelands Commission has promulgated administrative regulations to enforce the Act. N.J.A.C. 7:50-6.5, part of these regulations, delineates seven separate categories of land grouped by soil and vegetation which are classified as inland wetlands. The list is not exclusive and it does not contain the inundation or saturation elements which have caused so much trouble in the federal definition.

The protective tone of the Pinelands Act is set by N.J.A.C. 7:50-6.6 which prohibits development of any kind in wetlands located within the Pinelands unless specifically authorized. The only types of developments authorized by the regulations are agriculture and horticulture (N.J. A.C. 7:50-6.8), forestry (N.J. A. C. 7:50-6.9), low intensity recreational uses (N.J.A.C. 7:50-6.11), water dependent recreational facilities (N.J.A.C. 7:50-6.12) and public improvements such as bridges and roads (N.J.A.C. 7:50-6.13). Even these limited uses are allowed only if they do not cause a significant adverse impact, defined in N.J.A.C. 7:50-6.7 to include any change in wetlands vegetation, alteration of the water table, loss of habitat, etc. Moreover, the protections afforded by this act extend to all lands located within 300 feet of any wetland. N.J.A.C. 7:50-6.14. This creates a buffer zone of protection surrounding all wetlands, a significant protective device missing from the federal act.

As these provisions plainly indicate, the Pinelands Protection Act is a significant and effective state program for managing inland wetlands resources. It is a program, in many ways superior to its federal equivalent.

While it is true that the Pinelands Protection Act applies only to the south and central portions of New Jersey, the northern part of the state is not left unprotected. There is a second legislative enactment which applies to wetlands located in that area. This is the Hackensack Meadowland Reclamation and Development Act, N.J.S.A. 13:17-1 *et seq.* Pursuant to this statutory mandate, the Hackensack Meadowland Development Commission (HMDC) is given the authority to adopt a master plan for the area. N.J.S.A. 13:17-6(i). In adopting this master plan which sets the tone for development in the district, the HMDC is commanded to give deference to the legislative declaration of purpose which states in part "that the necessity to consider the ecological factors constituting the environment of the Meadowlands and the need to preserve the delicate balance of nature must be recognized to avoid any artificially imposed development that would adversely affect not only this area but the entire State." N.J.S.A. 13:17-1.

The HMDC has not ignored this legislative intent. It has promulgated a series of regulations which clearly support it.

The starting point for development within the district is N.J.A.C. 19:4-4.11 which prohibits any development in wetlands except in conformance with the HMDC Wetlands Order. Hackensack Meadowlands Development Commission, Master Plan Wetlands Order, adopted (Nov. 8, 1972). The Wetlands Order is a detailed analysis of the wetlands within the Meadowlands district. It provides specific criteria against which all proposed development in the area must be measured. Specifically, the Order requires an extensive assessment of the environmental impact of any development in a wetlands area. This includes frequent soil sampling and testing during the construction phase of the project. Clearly the HMDC's concern is not ended when a permit is granted.

The HMDC has adopted an open space plan for a 6,210 acre open space system consisting of 3,160 acres of wetlands, 1,375

acres of public parks, 1,400 acres of open water, 50 acres for waterway buffer strips and 80 acres of waterfront recreation use. The only development allowed in this system consists of 145 acres for school purposes. N.J.A.C. 19:4-7.2. In addition, there exists a marshland preservation zone in which the only permitted uses are scientific study in regard to marshland ecology and walkways for nature observations. N.J.A.C. 19:4-7.3(b). In fact, there is even a specific prohibition against the use of motor driven vehicles and equipment in this zone. N.J.A.C. 19:47.3(d)(2). It is manifestly obvious that the HMDC regulations offer a far more comprehensive plan for wetlands management than the regulations of the Army Corps of Engineers.

Taken together, the Pinelands Protection Act and the Hackensack Meadowlands Reclamation and Development Act encompass the vast majority of inland wetlands in New Jersey. However, recognizing that there may still be some areas ieft unprotected, Senator Lynch of the New Jersey Legislature has proposed S. 602, '201st Leg. (N.J. 1984) entitled "An Act Concerning The Regulation of Freshwater Wetlands." This Act represents a far more ambitious program for wetlands preservation than any federal plan.

The definition of freshwater wetlands which this Act is meant to regulate is not only broader than the Corps' definition, it is easier to apply. It encompasses the traditional inundation or saturation requirement of 33 C.F.R. 323.2(c). However, it also specifically provides that areas exhibiting these characteristics may be entirely man-induced. Even more significantly, it provides that any area having hydric soils is, by definition, a wetland. This makes it relatively simple to determine whether an area constitutes wetlands simply by taking a soil sample. Under this definition, there could be no doubt that all lands of ecological importance would be classified as wetlands and subsequently protected.

The protection itself is more extensive under the Lynch Bill than under the Corps' regulations. Under the Lynch Bill, in order to obtain a permit to fill a freshwater wetland, a developer must prove that the activity is water dependent, has no feasible alternative site, maintains the natural movement of water in the wetlands and will result in minimum feasible alteration of the natural contour, vegetation, fish and wildlife resources. These requirements are specific enough to allow for ease in enforcement and protective of wetlands to such a degree as to firmly refute any argument that the individual states are incapable of protecting their own wetlands.

New Jersey's legislative measures to protect wetlands have not been in vain. State wetland regulation has consistently found approval in the New Jersey court system. In some cases the courts have gone even farther than the legislature. One such example is *Fine v. Galloway Tp. Committee,* 190 N.J. Super 432 (Law Div. 1983) in which the court held that the Pinelands Protection Act did not prevent an individual municipality within the Pinelands from adopting and enforcing even more restrictive standards of wetlands protection on its own. The court noted that the Pinelands Protection Act is designed to "preserve the continued viability of lands located in the Pinelands region and to protect the unique natural, ecological, agricultural and horticultural resources found in the region." 190 N.J. Super at 444. Therefore, anything designed to advance this goal would be authorized by the Act.

In *Orleans Builders & Developers v. Byrne,* 186 N.J. Super 432 (App. Div. 1982) a New Jersey appeals court upheld the constitutionality of the Pinelands Protection Act as it applied to the regulation of freshwater wetlands. According to the court, the freshwater wetlands areas within the Pinelands "serve significant functions in flood control, in purifying water and in providing a habitat for endangered animals, trees and plants." 186 N.J. Super at 443. Because the Pinelands Act through its

legislative goals recognizes the truth of this principle, the extent of the wetlands degradation was held to be irrelevant. "If exemptions should be granted because development on individual tracts would impair only minutely the entire resources of the Pinelands, the cumulative effect of such exemption would defeat the legislative goals of the Pinelands Protection Act." 186 N.J. Super at 444. Thus, the Pinelands Protection Act is in full force in New Jersey.

Similarly, the constitutionality of the Hackensack Meadowlands Reclamation and Development Act withstood constitutional challenge in *Meadowlands Regional Development Agency v. State,* 63 N.J. 35 (N.J. 1973), *appeal dismissed,* 414 U.S. 991 (1973). Soon after the Act was passed, it was declared that the HMDC had the authority to regulate sanitary landfills within its boundaries. *Municipal Sanitary Landfill Authority v. Hackensack Meadowlands Development Com mission,* 120 N.J. Super. 118 (App. Div. 1972). Sanitary landfills were a serious problem affecting wetlands in northern New Jersey before the HMDC acted to clean them up.

In a different context, the courts have construed state procedural rules to afford maximum protection to wetlands. In *Crema v. New Jersey Department of Environmental Protection,* 192 N.J. Super. 505, (App. Div. 1984), *certif. denied,* 96 N.J. 306 (N.J. 1984) the court held that a party challenging the decision of the Department of Environmental Protection to grant, rather than deny a development permit, need prove merely that the agency's action was erroneous. The usual standard for review of administrative action in New Jersey is the arbitrary and capricious model. Thus, the New Jersey Legislature and courts have acted in concert to preserve the state's wetlands resources.

There is one additional layer of protection for wetlands in New Jersey. The state agencies entrusted with the task of protecting

wetlands have done so diligently. As previously discussed, the Pinelands Commission and the HMDC have promulgated stringent regulations which ensure that wetlands within their respective boundaries will be protected. On a state-wide basis, even before enactment of the Lynch Bill, the New Jersey Department of Environmental Protection has vigorously pursued its own role in wetlands protection. A recent illustration shows clearly the concerns of this agency. Prudential Insurance Company is currently seeking permission to build a large office complex in New Jersey. The complex is to be constructed on 367 acres of freshwater wetlands in Lee Meadows of Parsippany Township. The Army Corps of Engineers provided the developer with all necessary permits in 1982. The DEP, however, objected to the project and so informed the Corps. In 1984, the Corps, under pressure from DEP reversed its former approval. Negotiations are currently underway with Prudential to meet DEP's objection. There could scarcely be better proof that the State of New Jersey is fully protective of its own inlands wetlands and is better equipped to handle the job than the Army Corps of Engineers.

This discussion of the state wetlands programs is not under any circumstances to be considered all inclusive. It is merely representative of states which have enacted specific legislation aimed at protecting what is properly considered to be a state resource. *See, e.g.,* The Coastal and Inland Wetland Restriction Act of Massachusetts, C. 131 Sec. 40A and the Minnesota Water Bank Program, Minn. Stat. Ann. 105.392 *et seq.* both of which afford protection for inland wetlands. The federal government's involvement is at best duplicative and at worst destructive of these legitimate state interests.

III.

THE ARMY CORPS OF ENGINEERS HAS INCONSISTENTLY INTERPRETED ITS OWN REGULATIONS, MAKING JUDICIAL DEFERENCE TO THAT INTERPRETATION INAPPROPRIATE.

The petitioner urges reversal of the Sixth Circuit's decision on the ground that the court failed to give proper deference to the Army Corps of Engineers' interpretation of its own regulations (Pet. Brief at 18). What the petitioner fails to recognize, however, is that such deference is proper only when the agency in question has exhibited a history of consistency in interpretation. When the agency's decisions have been inconsistent, no deference is due. This Court has recognized this fundamental principle on many occasions. *Watt v. Alaska,* 451 U.S. 259 (1981); *S.E.C. v. Sloan,* 436 U.S. 103 (1978); *Morton v. Ruiz,* 415 U.S. 199 (1974) and *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944). The common sense of this principle is self-evident, for a court cannot defer to an agency's interpretation of its regulations unless it can be sure what this interpretation really is. Deference to an inconsistent series of agency decisions would give that agency unbridled power to define its jurisdiction without ever incurring the risk of effective judicial review. These principles are especially relevant here for the Army Corps of Engineers' interpretation of its jurisdiction has been widely inconsistent.

The Sixth Circuit decision in the instant case was based on the Corps' extension of its own jurisdiction beyond the parameters Congress had envisioned. During the same general period, however, the Corps has come under attack by environmental groups for its seemingly unwarranted liberality in either granting dredge and fill permits or declining to exercise its jurisdiction at all. One development which received a great deal of attention is the Westway Highway Project in New York City. This six billion

dollar proposal would necessitate filling in the equivalent of 240 acres of the Hudson River between 42nd Street and Battery Park. Despite the strenuous and repeated objections of the Environmental Protection Agency, the Fish and Wildlife Service and the National Marine Fisheries Service, the Corps of Engineers granted a dredge and fill permit. The Corps' decision is, at the time of submission of this brief, the subject of a trial before the Honorable Thomas P. Griesa of the United States District Court, Southern District of New York. In an earlier proceeding in 1982 Judge Griesa voided a prior grant of this permit stating that the Corps' decision could "only be explained as resulting from an almost fixed predetermination to grant the Westway landfill permit." *Action for Rational Transit v. West Side Highway,* 536 F. Supp. 1225, 1248 (S.D.N.Y. 1982).

Though Westway involves a coastal wetland, similar examples may be found in inland wetlands cases. Columbia Manor is a housing project located south of the Columbia Turnpike in Florham Park, New Jersey. In order to construct this development, it became necessary to fill 3.5 acres of forested wetlands. The Fish and Wildlife Service reported unauthorized fill activity to the Corps. After examining the site, the Corps decided it did not have jurisdiction over the fill because the wetlands were relatively small isolated pockets that were detached from the larger area of wetlands and because Columbia Road separates these wetlands from the other wetlands. *See* State College Field Office of Ecological Services, *An Assessment of the Corps of Engineers' Section 404 Permit Program in Northern New Jersey 1980-1984* (August 1984) at 28 (hereinafter *Program Assessment*).

Similarly, Riverside's property in Michigan is ringed on all four sides by paved public streets and fully-developed urban areas. In one instance the Corps exercises its jurisdiction and denies a fill permit while in the other it chooses to ignore the area entirely. Inconsistencies such as this make it impossible to arrive at sound

business judgments whether to purchase land and whether to fill. At the same time, they make deference to the Corps' interpretation inappropriate.

The *Program Assessment* also offers a significant insight into the Corps' decision making process by its examination of an office complex proposed by Bellemead Development Corporation in the Hackensack Meadowlands of New Jersey. As related by this publication, in 1983 Bellemead was alleged to have filled approximately five acres of wetlands in Lyndhurst, New Jersey. The Fish and Wildlife Service reported the unauthorized fill to the Corps. It was subsequently learned that Bellemead had not sought a permit initially because Mr. Dennis Suszkowski, a representative of the New York Corps District had previously told an applicant who filled nearby wetlands that the Corps had no interest in the area. During a telephone conversation with Robin Burr of the Fish and Wildlife Service, John Marazzo, a representative of the Corps, revealed that both he and the U.S. Attorney, Mike Gilberti, were concerned that the Corps now looked arbitrary and capricious. *Program Assessment* at 6.

It is plain to see that the Corps' jurisdictional decisions have been inconsistent not only on a nationwide scale, but within individual districts and even on a local scale. This has even been recognized by a congressional study which concluded in understated fashion, that "there is a great deal of variability in the manner in which the 404 program is implemented among the semi-autonomous districts." *OTA Report* at 176. This conclusion is borne out by a comparison of Corps' decisions throughout the country. This inconsistency is clearly caused by the lack of specificity in the definition of wetlands promulgated by the Corps. There is no national standard for Corps jurisdiction to which this Court can defer. The inconsistent and unpredictable action of the Corps of Engineers is exactly what one might expect when an administrative agency attempts to impose its own standard

on what is primarily a local concern in derogation of the congressional intent to defer to the individual states' sound judgment in these matters affecting their vital local interests. Therefore, deference is inappropriate and this ground for reversal must fail.

CONCLUSION

For the foregoing reasons *amicus* respectfully submits that the decision of the Court of Appeals should be affirmed.

Dated: June 28, 1985

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Association